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Supreme Court of the United States

October Term, 1974
No. 74-249

E. P. PERINI, Superintendent
Marion Correctional Institution,
Petitioner.

vs.

OBIE BROOKS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Obie Brooks, Jr., respectfully prays this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment and final order of that Court entered on June 4, 1974, rehearing denied July 26, 1974, which judgment affirmed the granting of the Writ of Habeas Corpus to respondent by the United States District Court for the Northern District of Ohio, Western Division.

JURISDICTION

Respondent is presently incarcerated in the Marion Correctional Institution, Marion, Ohio pursuant to a conviction under Section 2901.05, Ohio Revised Code, for second degree murder by a three judge panel of the Court of Common Pleas of Summit County, Ohio. Respondent brought an appeal from this conviction in the Court of Appeals of Summit County, Ohio, which affirmed the conviction. The respondent then filed a notice of appeal and memorandum in support of jurisdiction in the Supreme Court of Ohio. After referring the oral arguments of the respondent's appeal to a master commissioner, the Supreme Court of Ohio denied the respondent's request for leave to appeal from the judgment of the Court of Appeals of Summit County, Ohio.

On November 29, 1973, the United States District Court for the Northern District of Ohio issued the Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

The petitioner appealed from this judgment to the United States Court of Appeals for the Sixth Circuit. After oral arguments in that Court, the judgment of the United States District Court was affirmed on June 14, 1974. The petitioner suggested a rehearing *en banc* but no Judge of that Court requested a rehearing *en banc*, thus the petition was referred to the panel which heard the original appeal. The Court then denied the petition for rehearing.

This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254, and pursuant to Rule 19(b) of the United States Supreme Court Rules.

QUESTIONS PRESENTED

1. The United States Court of Appeals' affirmance of the judgment of the United States District Court was correct in that respondent's request for counsel during the custodial interrogation without counsel being provided violated the sixth amendment, and that continued interrogation efforts to obtain a waiver of counsel caused the subsequent statement to be made involuntarily in violation of the fifth amendment, as interpreted in *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. The United States Court of Appeals' affirmance of the United States District Court's issuance of the Writ of Habeas Corpus was without error in that respondent is in custody in violation of the Constitution of the United States.

3. The United States Court of Appeals' affirmance of the judgment of the United States District Court was correct in that the admission of the challenged statement resulting from the custodial interrogation was not accompanied by independent and overwhelming evidence of respondent's guilt fairly established in the State Court and thus constituted prejudicial error in the State Court.

4. The United States Court of Appeals' affirmance of the United States District Court's issuance of the Writ of Habeas Corpus was without error in that respondent had exhausted his State Court remedies and had complied with the requirements of 28 U.S.C. § 2254 (b) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Amend. V:

> . . . nor shall be compelled in any criminal case to be a witness against himself, . . .

U.S. CONST. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence.

U.S. CONST. Amend XIV:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On October 29, 1971, Ossie Avon McMillan, Jr. came to the house of respondent, Obie Brooks, Jr., in Akron, Ohio. McMillan told the respondent that he needed money and that he wanted to go out and get some money. McMillan then left the respondent's house, and Brooks left separately. They later returned to the respondent's house separately.

Thereafter, both men left together in McMillan's car heading east on Market Street, finally to the downtown Akron area, in the vicinity of the Mayflower Hotel. They saw a man who appeared to be intoxicated getting into his car. This individual started to drive north on Main Street. McMillan was driving and followed this car to the South Street—Kling Street area.

McMillan had a registered handgun in the glove compartment of his car. There was an argument between Obie Brooks and McMillan while they were in the car prior to the time that they arrived at the South Street—Kling Street area, and respondent was worried about McMillan, so he took the gun.

The man they were following stopped in the parking lot behind a bar commonly known as the South Bar in the South Street—Kling Street area. McMillan parked on Kling Street. When Brooks got out of the car, he had the

gun. McMillan followed Brooks between some houses to the far end of the parking lot behind the South Bar which is also located close to Clay Drive or Clay Court. When the respondent got to the area, he did not see anything.

The respondent heard McMillan say, "Do you see anything", or "Do you see him?" The respondent replied, "No, let's go."

Obie Brooks and McMillan started walking back the way they came. As they were leaving the area, a number of people left the South Bar. These people ran toward the two men, apparently thinking the two were "frisking" cars. The two men began running and once they reached Kling Street, they separated but were still being chased.

As Obie Brooks ran, he turned and fired twice after he heard a prior shot. Other witnesses testified that they heard more than two shots.

Mr. Brooks testified that he went around the corner on South Street and that another man came up to him, Brooks turned, pointed the gun at him and said "Don't follow me"; the man did not follow and Brooks left.

On Tuesday, November 9, 1971, at approximately 10:00 a.m., respondent was arrested by Akron Police Officers Farmer and Peaslee pursuant to a warrant outside his cousin's home.

Respondent was taken to the Akron Police Headquarters where he was taken into an interrogation room. He was read the warnings prescribed in *Miranda v. Arizona,* 384 U.S. 436, 474 (1966).

Respondent testified that he was a narcotics addict and that he was sick from the symptoms of withdrawal, and that he was told that if he made a statement, he would be treated once he was in jail (R. 24a).

Arresting Officer Farmer admitted in the suppression hearing that he had no knowledge of drug addiction or the symptoms of drug withdrawal (R. 29a).

Assistant Summit County Prosecutor Lowrey admitted that he was not an expert in the process of withdrawal (R. 37a), and that neither he nor anyone in his presence inspected the respondent's arms for needle marks.

Assistant Summit County Prosecutor Charles Lowrey was summoned to the interrogation room where he read to the appellee the *Miranda* warnings.

During this period of time, the respondent, Obie Brooks, a narcotics addict, was going through withdrawal. Assistant Prosecutor Lowrey testified:

> So necessarily, when I arrived there *he must have been there in custody for some period of time,* I have no idea; it varies, I am sure, how long he has been there; it may be as little as five minutes *or it may be several hours before* . . . (R. 38a) (emphasis added).

The arresting officers first engaged the respondent in preliminary conversation and Assistant Prosecutor Lowrey subsequently arrived to conduct the recorded interrogation in question. In the presence of the two arresting officers, the prosecutor advised the respondent of his constitutional rights as set forth in *Miranda, supra.*

During the cross-examination at trial of Assistant Prosecutor *Charles* Lowrey, by his *brother, Thomas* Lowrey, counsel for the defendant, Assistant Prosecutor Lowrey made the following admissions. (Respondent adopts the petitioner's summary of these admissions, petitioner's brief page 7.)

> There is no question that appellee had expressed a wish to have an attorney and that an attempt was

made to get one for him as was the practice in the Summit County's Prosecutor's Office.

The District Court's summary of the testimony reflects that:

> The petitioner stated at the hearing and the trial that the prosecutor asked him to make a statement, and that he started on it and then he stopped because he wanted a lawyer and communicated this desire to the prosecutor. Petitioner related that the prosecutor stated he would call the judge and try to arrange to get the petitioner a lawyer, and the prosecutor then immediately left the room for fifteen minutes. Upon returning, according to the petitioner, the prosecutor told the petitioner that he could not get in contact with the judge. The petitioner then testified that the prosecutor again began to question him and that he answered some of the prosecutor's questions but after about five or ten minutes the petitioner again requested the presence of a lawyer. The prosecutor, according to Brooks, once again left the room and upon his return told the petitioner that he had reached the judge but that he could not contact a lawyer. Petitioner then testified that after being informed by the prosecutor that he could not contact a lawyer, the prosecutor again read him the *Miranda* warnings. (Petitioner's Appendix 27).

No attorney was obtained for the respondent, Brooks, during custodial interrogation. The custodial interrogation was continued by Assistant Prosecutor Lowrey's efforts to obtain a waiver of counsel from Brooks. The respondent finally gave to the prosecutor the recorded statement in question.

The respondent's counsel raised a timely objection to the admission of recorded statement at trial (R. 21a) and also made a timely motion to suppress the recorded transcript made during the custodial interrogation of the appellee.

A suppression hearing before the three-judge panel resulted in the overruling of the respondent's motion to suppress the statement and this statement was admitted into evidence (R. 67a). Respondent was convicted of second degree murder before the three-judge panel of the Court of Common Pleas of Summit County, Ohio.

REASONS FOR NOT GRANTING THE WRIT

I. The United States Court of Appeals' affirmance of the judgment of the United States District Court was correct in that respondent's request for counsel during the custodial interrogation without counsel being provided violated the sixth amendment, and that continued interrogation efforts to obtain a waiver of counsel caused the subsequent statement to be made involuntarily in violation of the fifth amendment as interpreted in Miranda v. Arizona, 384 U.S. 436 (1966).

At issue here is the petitioner's contention that the language of *Miranda v. Arizona, supra,* should be construed broadly to permit the further interrogation of a person in custody, after the person has requested that he be allowed to confer with a court-appointed attorney.

The language of *Miranda v. Arizona,* 384 U.S. at 473-74 is explicit as to the procedures the interrogators *should* have followed at this point.

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. (emphasis added).

The United States Court of Appeals for the Sixth Circuit followed the plain language of *Miranda* in *Combs v. Wingo*, 465 F.2d 96 (6th Cir. 1972). In that case the court found that the petitioner's privilege against self-incrimination, as protected by the fifth amendment, was violated when a police officer was permitted to testify, over objection, about an oral confession elicited from the petitioner by the police after he had invoked his right to remain silent.

The method used in that case was the production by the police of a ballistics report after the petitioner had invoked his right to remain silent.

Although the case at bar deals with the invocation of a petitioner of a right to counsel, also during custodial interrogation, the distinction is not important for the purposes of analogy, for as Justice Palmore of the Kentucky Court of Appeals has stated:

> The purpose of a question is to get an answer. Anything else that has the same purpose falls in the same category and is susceptible of the same abuses *Miranda* seeks to prevent. *Combs v. Commonwealth*, 438 S.W. 2d 82 (1969) (dissent).

The United States Court of Appeals found that the statements made by the petitioner Combs after the police

officer read the ballistics report were made involuntarily under fifth amendment standards as prescribed in *Miranda* and conditionally granted the Writ of Habeas Corpus.

Other courts have come to the same conclusion on identical or similar facts to the present case. In *United States v. Ramos*, 448 F.2d 398 (5th Cir. 1971), the accused received the *Miranda* warnings and invoked the fifth amendment right to remain silent. Authorities there, as Prosecutor Lowrey did here, continued to question the accused and obtained incriminating statements. The court there found that this was a constitutional violation sufficient for the issuance of the habeas corpus remedy.

In *United States v. Blair*, 470 F.2d 331 (5th Cir. 1973), *cert. denied*, 411 U.S. 908 (1973), the defendant Harrell was arrested at a United States Post Office and was then taken to a workshop area in the Post Office where he was advised of his *Miranda* rights by the arresting Postal Inspector. The defendant told the arresting officer that "he wanted representation by an attorney;" 470 F.2d at 337. Despite this request, and in utter disregard of this Court's express language in *Miranda v. Arizona*, 384 U.S. 436 (1966), the officer conducting the interrogation continued to question Harrell for more than one hour. The result of the interrogation was that the Postal Inspector elicited incriminating information which was, as was the statement in the present case, introduced at the trial over the defendant's timely objection.

Judge John R. Brown reversed Harrell's conviction and remanded his case for a new trial with the following analysis:

> The language of the Supreme Court in *Miranda* could hardly have been more uncompromising. "If (the accused) indicates in any manner and at any

> stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning." Miranda, supra,* 384 U.S. at 445, 86 S.Ct. at 1612 (emphasis added). "The right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." 384 U.S. at 469, 86 S.Ct. at 1625. "Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." "If the individual states he wants an attorney, *the interrogation must cease until an attorney is present."* 384 U.S. at 474, 86 S.Ct. at 1628. (emphasis added).

As the court stated in *United States v. Fisher,* 329 F. Supp. 630 (D. Minn. 1971):

> The very purpose of the *Miranda* warnings are to permit a defendant to refuse further interrogation and to enable him to obtain legal advice as to his rights. The interrogating officers, in any case, when a defendant so expresses himself and lodges such request, should not continue interrogation nor seek further to procure consentual admissions from him, whether in the form of confessions, consent to search, waiver of privilege or otherwise. 329 F. Supp. at 634.

In light of the above authorities, the United States Court of Appeals' affirmance of the District Court's conditional issuance of the writ of habeas corpus was in complete accordance with the precedent set forth by the Sixth Circuit Court of Appeals and the rulings of other United States Circuit Courts.

Under the above case law, the prosecutor correctly read the respondent his *Miranda* rights. Using the facts as agreed to by the state, the proper procedure would

have been a cessation of all interrogation until a court-appointed attorney was obtained.

When the prosecutor continued to question the respondent for the purposes of obtaining inculpatory statements or a waiver of the right to counsel, the *Miranda* decision again makes clear directions, 384 U.S. at 474:

> If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privileges *so long as they do not question him during that time.* (emphasis added).

The United States District Court properly applied the constitutional principles that *Miranda* calls forth, thus that court followed the basic procedures that a federal court is obligated to comply with under 28 U.S.C., § 2254(a).

The District Court looked to the trial court's conclusion that the respondent had waived his right to counsel subsequent to his request for counsel and found that if such a conclusion is accepted ". . . the constitutional protection promised by *Miranda* would indeed be illusory." (Petitioner's Appendix 36).

The proper application of relevant constitutional law requires the same conclusion as the United States District Court arrived at: The statement at issue was made involuntarily under fifth amendment standards; the timely objection (R. 79a) at trial of the introduction of the incriminating statement should have been sustained under a proper application of federal constitutional principles; the motion to suppress the involuntary statement (R. 21a-27a) should have been sustained under a proper application of federal constitutional law; and that the admission

of the statement at the trial required a reversal of the respondent's conviction.

The United States District Court and the United States Court of Appeals correctly found that the admission into evidence of this statement constituted a violation of the respondent's right against self-incrimination and the District Court held that ". . . it is impossible to determine what prejudicial effect the evidence coming from the accused's own mouth has on the trier of fact. The court concludes that a reversal of the state court conviction is constitutionally compelled." (Petitioner's Appendix 37).

The sixth amendment's guarantee of the right to counsel as set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and in *Miranda v. Arizona*, 384 U.S. 470, 472-73 (1966) was also denied to respondent at the interrogation stage.

> If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney.
>
> *Miranda v. Arizona*, 384 U.S. at 472.
>
> While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.
>
> *Miranda v. Arizona*, 384 U.S. at 472.

It should be clear that the Assistant Summit County Prosecutor, Charles Lowery, has never offered an explanation why he was unable to secure a court-appointed attorney for the indigent Obie Brooks, Jr. *during the middle of the day* (Petitioner's Brief 7). It should also be pointed

out that the Akron, Ohio, Police Station, where the respondent was interrogated is immediately adjacent to the Summit County, Ohio, Courthouse.

Thus, the prosecutor's actions remain largely unexplained. In a civilized society, however, there ought to be an explanation of why an indigent felony arrestee, cut off from the outside world in an interrogation setting, cannot be afforded the basic right to counsel. The failure to provide the respondent with counsel, in light of his requests and the authorities' continued interrogation after the requests were made, can only mean that Ohio has not met its heavy burden of proving that the respondent's statement was made after a knowing and intelligent waiver.

As the late Mr. Chief Justice Warren stated:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
>
> *Miranda v. Arizona*, 384 U.S. at 475. *See generally, Escobedo v. State of Illinois*, 378 U.S. 478 (1964).

Mr. Chief Justice Warren also stated:

> Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. 384 U.S. at 474.

As this Court stated in its October 1973 Term, per Mr. Justice Rehnquist:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in

willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. Tucker, 94 S.Ct. 2357 (1974).

The police and prosecutor in this case have not met the burden of showing that respondent knowingly and intelligently waived his privilege against self-incrimination and his right to appointed counsel. Neither have they met Mr. Justice Rehnquist's requirement that such official action must be pursued in "complete good faith". Thus, the United States Court of Appeals' affirmance of the judgment of the United States District Court in issuing the writ of habeas corpus was without error.

II. The United States Court of Appeals' affirmance of the United States District Court's issuance of the writ of habeas corpus was without error in that respondent is in custody in violation of the Constitution of the United States.

As the United States District Court noted, the facts giving rise to the respondent's constitutional claim are not in dispute and appear in sufficient clarity in the transcript of the hearing on the motion to suppress and the trial.

The crux of the District Court's issuance of the writ of habeas corpus was that the respondent was in custody

". . . pursuant to the judgment of a state court" on the grounds that the respondent is in custody in violation of the Constitution or laws or treaties of the United States, thus the District Court's issuance of the writ was in compliance with 28 U.S.C., § 2254(a), towit:

> § 2254. State custody; remedies in Federal courts
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The respondent's petition sought the traditional power of a federal court in cases involving a state prisoner, to independently apply the constitutional standards to the historical facts on which the petitioner bases his claim, regardless of how fairly and completely the state courts have litigated the claim. *See, Wright v. State of North Carolina,* 483 F.2d 405 (4th Cir., 1973), *cert. denied,* 94 S.Ct. 1452 (1974); *Combs v. Wingo,* 465 F.2d 96 (6th Cir. 1972).

The fact situation that occurred at the respondent's interrogation is not novel, for the *Miranda*-type fact situation found in *Combs v. Wingo, supra,* is similar. As the state has stipulated, the respondent twice expressed the desire to have a court-appointed attorney; several attempts were made by Assistant Prosecutor Lowrey to obtain an attorney; that Assistant Prosecutor Lowrey informed the respondent that there was no court-appointed attorney available; that Assistant Prosecutor Lowrey continued to question the respondent after again re-reading the *Miranda* warnings; and that Assistant Prosecutor Lowrey finally elicited the following response from the respondent: "I

would like to have one, but since there is none, it is all right." (R. 53a).

As the United States Court of Appeals for the Sixth Circuit decided in *Combs v. Wingo, supra,* this historical fact situation is governed by the fifth and sixth amendments as interpreted by the United States Supreme Court in *Miranda, supra.* The language in *Miranda* and *Combs* is so explicit, in light of the type of fact pattern found in the present case, that the application by the state court of any other principle of law or application of part of the *Miranda* rule without looking to all of the rule's requirements is clearly erroneous and requires an independent application of the correct constitutional standard by a federal court in a habeas corpus proceeding.

The District Court's application of the constitutional standard was correct and was an adoption of the *Combs'* court analysis of the following language in *Miranda,* 384 U.S. 436, 473-74 (1966):

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates *in any manner,* at any time prior or *during questioning,* that he wishes to remain silent, the *interrogation must cease.* At this point, he has shown that he intends to exercise his Fifth Amendment privilege; . . . *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* . . . If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, *they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.* (emphasis added).

Petitioner erroneously directs the Court's attention to the case *La Vallee v. Rose,* 410 U.S. 690 (1973). That

case concerned a habeas corpus proceeding where a federal evidentiary hearing was denied to the petitioner under 28 U.S.C., § 2254(d)(1). The present case is distinguishable from that 1963 pre-*Miranda*, pre-*Escobedo* situation where the petitioner attacked the state court's determination of the fact situation.

As the petitioner has stipulated, there is no disagreement as to the relevant facts here. Respondent simply contends that the District Court understood its role in a habeas corpus proceeding as to an independent application of the correct constitutional standard to the historical facts underlying petitioner's constitutional claim. This process of independent application presupposes that the historical facts are already established, as here. *See generally, Brown v. Allen*, 344 U.S. 443 (1953); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L.R. 1038, 1113 (1970).

Thus, the United States Court of Appeals' affirmance of the United States District Court's issuance of the writ of habeas corpus was without error.

III. The United States Court of Appeals' affirmance of the judgment of the United States District Court was correct in that the admission of the challenged statement resulting from the custodial interrogation was not accompanied by independent and overwhelming evidence of respondent's guilt fairly established in the State Court and thus constituted prejudicial error in the State Court.

The Attorney General of Ohio argues here that the United States District Court refused to consider the issue of harmless error (Petitioner's Brief 16). Respondent respectfully invites this Court's attention to the Opinion of the District Court, towit:

> The respondent contends that even if a constitutional violation occurred, there was no prejudicial error caused by the admission of the statement into evidence at the trial. The Court cannot accept this argument. As indicated in *Combs v. Wingo, supra,* the violation of the Fifth Amendment rights of the accused requires a reversal of the petitioner's conviction. The Court wholeheartedly agrees that *where the cherished right against self-incrimination has been violated, it is impossible to determine what prejudicial effect the evidence coming from the accused's own mouth has on the trier of fact.* The Court concludes that a reversal of the State Court conviction is constitutionally compelled. (Petitioner's Appendix 37). (emphasis added).

Consonant with this analysis is the opinion in *United States v. Blair, supra.* There, as here, the Government raised the issue of harmless error. The Court in *Blair* found that the Government's contention was "severely undermined" by its vigorous opposition to the motion to suppress at the trial level.[1] The Court in *Blair* observed that if the statement in question was as "innocuous" as the Government claimed it surely would have consented to suppression at the trial stage rather than risk reversal later on. 470 F.2d at 338.

The fact situation in *Milton v. Wainwright,* 407 U.S. 371 (1972), its ancestors and progeny, may be distinguished from the fact situation in the present case. As Mr. Chief Justice Burger noted in *Milton*:

---

1. Respondent's counsel raised a timely objection to the admission of the recorded statement at trial (R. 21a) and made a timely motion to suppress the recorded transcript made during the custodial interrogation of the respondent. A suppression hearing before the three-judge panel in Summit County Common Pleas Court resulted in the overruling of the respondent's motion to suppress the statement.

> The jury, in addition to hearing the challenged testimony, was presented with overwhelming evidence of petitioner's guilt, including *no less than three full confessions that were made by petitioner prior to his indictment.* Those confessions have been found admissible in the course of previous post-conviction proceedings brought by petitioner in his attempts to have this conviction set aside, and they are not challenged here. 407 U.S. at 374. (Emphasis added).

Instead of setting forth any unchallenged evidence that allegedly exists independent of the challenged statement at issue here, petitioner, instead, refers to the very facts contained in the complained of statement.

Petitioner, thus, does meet the standard prescribed by Mr. Chief Justice Burger in *Milton,* towit:

> [W]e do not close our eyes to the reality of overwhelming evidence of guilt *fairly established* in the State Court 15 years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, *beyond reasonable doubt, harmless.* 407 U.S. at 377, 378. (emphasis added).

In this case it is clear that the state trial court did not have the "overwhelming evidence of guilt fairly established" by the use of unchallenged evidence, 407 U.S. at 377, 378. The challenged statement provided the prosecution with a "key link in the evidentiary chain of proof" *United States v. Blair,* 470 F.2d at 338. Unlike *Milton* where there were three independent, unchallenged pretrial confessions and substantial real evidence, the case against this respondent depended on the use, by the prosecution, of the illegally obtained statement.

The United States Court of Appeals' affirmance of the issuance of the writ of habeas corpus of the United States District Court signifies that both federal courts have ruled that the use of this statement was prejudicial error.

IV. The United States Court of Appeals' affirmance of the United States District Court's issuance of the writ of habeas corpus was without error in that respondent had exhausted his State Court remedies, and had complied with the requirements of 28 U.S.C. § 2254(b) and (c).

The respondent raised the relevant federal constitutional claims before the Court of Common Pleas of Summit County, Ohio; before the Court of Appeals of Summit County, Ohio; and to the highest state appellate court (the Ohio Supreme Court).

After referring the oral arguments of the respondent's appeal to a master commissioner (which respondent contends deprived him of the due process of law), the Supreme Court of Ohio denied the respondent's request for leave to appeal from the judgment of the Summit County Court of Appeals.

The United States District Court decision, as affirmed by the United States Court of Appeals, held that this process complied with the requirements of 28 U.S.C., § 2254(b) and (c) as interpreted by *Fay v. Noia*, 372 U.S. 391 (1963). In that case, the United States Supreme Court held that in order for a state prisoner to successfully petition a federal court for a writ of habeas corpus, he must have exhausted his state court remedies at the time of his petition to the federal court.

The exhaustion of state remedies provision was made a part of the United States statutory law in 28 U.S.C., § 2254(b) and (c).

Subsequent to this inclusion, the United States Supreme Court interpreted what "exhaustion of state court remedies" was in *Picard v. Connors*, 404 U.S. 278 (1971). This Court held that a state prisoner need only have presented his constitutional claims to the highest state court.

Moreover, in *Howell v. Perini*, Civil No. 73-248 (N.D. Ohio, filed September 21, 1973), the United States District Court stated that "When a state prisoner has once presented his federal constitutional claims to the highest (state) court on an appeal of right, and the state courts have had an opportunity to pass on those claims, the petitioner need not pursue the additional procedures available under § 2953.21, *et seq.*, Ohio Revised Code, before presenting to the federal courts his constitutional claims by means of a writ of habeas corpus."

CONCLUSION

The crux of this case deals with the petitioner's attempt to construe *Miranda v. Arizona, supra*, so as to allow continued interrogation of a person in custody after that person has requested that he be allowed to confer with a court-appointed attorney.

An attorney never consulted with Obie Brooks, Jr. on that day, Tuesday, November 9, 1971; an attorney was never appointed to represent him on that day; there is no proof that the Assistant County Prosecutor made a good faith effort to secure Obie Brooks, Jr., an attorney on that day.

We do know that a statement was elicited from Obie Brooks, Jr., while he was undergoing the process of withdrawal from drugs. We also know that Obie Brooks, Jr. did not make the challenged statement until he was told by the Assistant County Prosecutor that they were unable to secure him court-appointed counsel. We know that this all occurred in the middle of a business day, on Tuesday, November 9, 1971, while all courts and many members of the Akron Bar were readily available.

This denial of the respondent's right to counsel and guarantee against self-incrimination in light of the surrounding circumstances can only point to the conclusion that the challenged statement was involuntarily made.

The trial counsel for the respondent came to the same conclusion and made a timely motion to suppress this statement which was overruled by the Summit County Court of Common Pleas. After relying on the challenged statement at trial, amid a paucity of other evidence, petitioner now contends that the admission of the challenged statement was harmless error.

The United States District Court decision and the affirmance thereof by the United States Court of Appeals of that judgment were correct in that both of those federal courts found that the denial of the respondent's constitutional rights called for the implementation of the writ of habeas corpus.

Respondent believes, therefore, that the decision of the United States Court of Appeals affirming the United States District Court's issuance of the writ of habeas corpus, unless a *retrial* by the State of Ohio and Summit County is held within the prescribed time, was without error.

Wherefore respondent prays that this Court deny the Writ of Certiorari sought herein.

Respectfully submitted,

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